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In the Supreme Court of the United States

OCTOBER TERM, 1976

HAROLD J. GARMANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court erred in denying his motion to suppress a document found by a Drug Enforcement Administration agent during a search of the contents of a flight bag that had been taken by the agent, at petitioner's request, from petitioner's rented car after his arrest.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner and co-defendants Woodrow Brown and David Bravo were convicted of conspiracy to possess marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846.[1] Petitioner was sentenced to five years' imprisonment, followed by a special parole term of three years,

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[1]Co-defendants Brown and Bravo were also convicted of possession of marihuana with intent to distribute it. Co-defendants Guadalupe Molina and Patsy Molina were acquitted.

and was fined $5,000. The court of appeals affirmed without opinion (Pet. App. B) and denied a petition for rehearing (Pet. App. A).

1. The evidence showed that on May 29 and 30, 1975, Agent Kenneth Moore of the Drug Enforcement Administration was told by a reliable informant that a man named Brown, who was staying at the Quality Inn Motel in Pharr, Texas, was attempting to negotiate a marihuana transaction and that Brown was using a Kenworth truck and trailer with a stated license number. After Agent Moore ascertained that Woodrow Brown was occupying Room 148 at the motel and was driving a Kenworth truck having the described license number and trailer, he began a surveillance (Tr. 46-48).

On the afternoon of June 1, 1975, co-defendants Guadalupe and Patsy Molina arrived at the motel in an Oldsmobile registered to Mrs. Molina and visited Room 148 for about ten minutes (Tr. 50-52, 259). Visits to Room 148 were also made on that day by a person driving a Gremlin, who was later identified as defendant Bravo (Tr. 51, 59-60, 260, 262), and by another person driving a Pontiac LeMans (Tr. 260). That evening, Agents Moore and Wayne Wilkins looked through a ventilating door at the rear of the Kenworth truck, which was parked next to Room 148, saw three burlap bags (containing what appeared to be bricks) and detected the odor of marihuana (Tr. 52, 260-261).

On the afternoon of June 2, 1975, a person driving a rented Pontiac Grand Prix arrived at the motel and visited Room 148. At about 10:00 p.m., the Kenworth truck and trailer were moved to a gasoline station in McAllen, Texas, and the Gremlin and Grand Prix were also moved to that location (Tr. 61-62, 263). Early in

the morning of June 3, the truck and trailer were moved once again, this time to a parking lot behind a Ramada Inn (Tr. 62-63; 263-264). At about 7:30 a.m., petitioner, driving the rented Grand Prix and accompanied by Brown, arrived at the Ramada Inn and parked about fifty feet from the truck-trailer. Petitioner raised the hood on his vehicle, walked over to the truck-trailer, returned to his vehicle, and stood beside the car, looking around the area. Brown then left the Grand Prix and opened up the trailer (Tr. 264-265). Shortly thereafter, Bravo arrived in Mrs. Molina's Oldsmobile, entered the trailer, and started handing out burlap sacks to Brown, who loaded them into the Oldsmobile. At this point, Drug Enforcement Administration agents moved in and arrested Brown, Bravo, and petitioner. In a false compartment of the Oldsmobile the agents found burlap sacks containing 617 pounds of marihuana (Tr. 32-39, 41, 265-273).

After petitioner's arrest, he drove in the rented Grand Prix with an agent to the Drug Enforcement Administration office. Before petitioner entered the office, he stated that he had some belongings in the trunk of the car. The agent, in petitioner's presence, then opened the trunk and removed some luggage, including a flight bag, and carried it into the office, where it was searched. Among the items found in the flight bag was a note (G.X. 19), the meaning of which was not clear on its face, bearing the figures "$3,360" and "32 pounds" (Tr. 207-208, 238). In addition, the agents found $12,000 in cash in a plastic bag being carried by petitioner (Tr. 69-70).

Petitioner did not move prior to trial to suppress this evidence. During trial, however, the district court held a hearing, out of the jury's presence, on petitioner's motion to suppress the note (Tr. 11, 72, 207-228). The court then denied the motion, holding that the agents had probable cause to arrest petitioner and to search the

car and the flight bag found therein (Tr. 226-227). Moreover, the court found that petitioner had specifically asked to have his belongings taken from the trunk of the car and had claimed the flight bag as his own.

After admission of the document, an agent testified that petitioner had stated following his arrest that the entry on the note related to his purchase of meat (Tr. 237-238). Although petitioner did not testify in his own defense, his only witness, Charles Roe, testified that the note referred to the price of a truckload of berries or lettuce and was not in petitioner's handwriting (Tr. 409-410). The government contended in its closing argument that the note evidenced a marihuana transaction (Tr. 454), and the conflicting interpretations were summarized in the court's instructions to the jury (Tr. 520).

2. Petitioner contends (Pet. 4) that the ambiguous note found by the agents when the contents of his flight bag were examined after his arrest was seized in violation of the Fourth Amendment, as interpreted in *Preston* v. *United States*, 376 U.S. 364. *Preston*, however, involved the warrantless search of an automobile, following the arrest of its driver and passengers for vagrancy, in the absence of probable cause to believe that it contained evidence of a crime. The Court held that the search was "too remote in time or place to have been made as incidental to the arrest" (*id.* at 368), which was the sole justification offered to support the search.

By contrast, as the district court found (Tr. 226), the agents in this case had probable cause to believe that the rented automobile driven by petitioner at the time of his arrest contained evidence of the illegal drug transactions. The search and seizure of the items found in the trunk of the car immediately after it had been brought to the Drug Enforcement Administration office

and after petitioner had expressly requested that his flight bag be removed was therefore reasonable.[2] See *Texas* v. *White*, 423 U.S. 67; *Chambers* v. *Maroney*, 399 U.S. 42. See also *United States* v. *Friesen*, C.A. 9, No. 75-1799, decided November 12, 1976; *United States* v. *Zaicek*, 519 F. 2d 412 (C.A. 2); *United States* v. *Soriano*, 497 F. 2d 147 (C.A. 5) (*en banc*).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

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[2]The search of the flight bag after it had been removed from the trunk at petitioner's request was also justified in the circumstances of this case by the need to inventory the belongings of a person validly under arrest (Tr. 226). See *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976.

[3]Petition for a writ of certiorari from affirmance of judgment of conviction (C.A. 5, No. 75-4264, June 30, 1976) pending *sub nom. Aviles* v. *United States*, No. 76-5132.

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